



United States Senate
Washington, DC 20510

March 20, 2018

RE: ACLU Vote Recommendation in Favor of Wyden Content Moderation Amendment to H. R. 1865 – The “Allow States and Victims to Fight Online Sex Trafficking Act”

Dear Senator:

AMERICAN CIVIL
LIBERTIES UNION
WASHINGTON
LEGISLATIVE OFFICE
915 15th STREET, NW, 6TH FL
WASHINGTON, DC 20005
T/202.544.1681
F/202.546.0738
WWW.ACLU.ORG

FAIZ SHAKIR
DIRECTOR

NATIONAL OFFICE
125 BROAD STREET, 18TH FL.
NEW YORK, NY 10004-2400
T/212.549.2500

OFFICERS AND DIRECTORS
SUSAN N. HERMAN
PRESIDENT

ANTHONY D. ROMERO
EXECUTIVE DIRECTOR

ROBERT REMAR
TREASURER

The American Civil Liberties Union (ACLU) recommends a “YES” vote on Sen. Ron Wyden’s Content Moderation Amendment to H.R. 1865 – the “Allow States and Victims to Fight Online Sex Trafficking Act” (FOSTA), which is expected to be considered on the Senate floor as early as Wednesday, March 21, 2018. FOSTA attempts to curtail sex trafficking crimes facilitated by online activity, but fails to do so effectively while imposing new restrictions on online platform providers that would significantly curtail the openness of online political, artistic, and commercial communications.

Sen. Ron Wyden has proposed two amendments to H. R. 1865, one of which would provide some protections to online platforms engaged in moderating their sites (the “Wyden Amendment”).¹ While ACLU will continue to oppose the underlying bill as a whole², we recommend a vote in favor of the Wyden amendment as a positive step in offering some protection to responsible online platforms and lessening the possible impacts on the scope and diversity of access to online content.

The proposed content moderation amendment addresses one strand of criticism offered by ACLU and others: that FOSTA would discourage platform providers from online content moderation for fear of liability if they didn’t do so perfectly. The Wyden Amendment means that those providers don’t have to police their sites perfectly. The amendment as written, however, does not address another likely outcome: over-moderation to avoid liability. Given the ambiguity of terminology in the bill as a whole, site operators will be uncertain whether generalized but unspecified knowledge of the possible presence of unlawful

¹ The purpose of the relevant Wyden Amendment is “To clarify that efforts of a provider or user of an interactive computer service to identify, restrict access to, or remove objectionable material shall not be considered in determining the criminal or civil liability of the provider or user for other material: (available at <https://www.congress.gov/congressional-record/2018/03/19/senate-section/article/S1795-2?>).

² See ACLU Letter to U. S. Senate (Mar. 12, 2018); ACLU Letter to U. S. House (Feb. 26, 2018) (available at <https://www.aclu.org/letter/aclu-vote-recommendation-congress-oppose-h-r-1865-allow-states-and-victims-fight-online-sex>)

material on a site constitutes the knowledge necessary for sanction under the new law. That uncertainty will certainly lead platform providers to over-moderate out of an abundance of caution and take down some material out of fear that overzealous prosecutors will find the content problematic. The absence of a perfect solution, however, should not detract from the benefit of the proposal and, accordingly, ACLU urges a vote in favor of the Wyden Content Moderation Amendment.

For more information, please contact First Amendment policy advisor Michael Macleod-Ball at 202.253.7589 or macleod@627consulting.com.

Sincerely,

A handwritten signature in black ink, appearing to read "Faiz Shakir". The signature is fluid and cursive, with the first name "Faiz" written in a larger, more prominent script than the last name "Shakir".

Faiz Shakir
National Political Director

cc: Members of the U. S. Senate